IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1044

CARAVEL OFFICE BUILDING COMPANY,
A District of Columbia limited partnership, and
CLIFFORD J. HYNNING,
Managing General Partner of said limited partnership,
Petitioners,

v.

BOGLEY HARTING MAHONEY &
LEBLING, INC., A Maryland corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bogley, Harting, Mahoney & Lebling, Inc., hereinafter called Respondent, files its Brief in Opposition to the Petition for Writ of Certiorari heretofore filed by Caravel Office Building Company and Clifford J. Hynning, hereinafter called Petitioners. The Petitioners were defendants in the trial Court and the Respondent was plaintiff in the trial Court.

References to matters contained in the Petitioners' Appendix A will be referred to as Petitioners have done in their Petition. References to Respondent's Appendix attached hereto (Appendix B) will be referred to as pp. b.

OPINIONS BELOW

Your Respondent agrees that the official and unofficial reports of the opinions, orders and judgments delivered in the courts below are correctly set out in Petitioners' Appendix A, although not in chronological order.

JURISDICTION

The Petition cites the statutory provision of jurisdiction as 28 USC 1257(3), but does not contain a specifically identifiable, concise statement of the grounds on which the jurisdiction of this Court is invoked. Counsel for Respondent will not speculate as to the grounds upon which the Petitioners attempt to invoke the jurisdiction of this Court.

Your respondent objects to Petitioners' attempt to invoke the jurisdiction of this Court in this matter on the following basis:

1. As will be further argued in this Brief, this cause involves a State trial Court holding a contract valid, based upon the general law of the land applicable to the facts, as established by the evidence. This being the case, Respondent respectfully submits that this Court cannot review the decision of the trial Court in Virginia and the decision of the Supreme Court of Virginia. *Delmas v. Insurance Company,* 14 Wall. 661; *Chicago and Alton Railway v. Wiggins Ferry Company,* 119 U.S. 615 (1887).

2. Your Respondent submits that a Writ of Certiorari should be granted only when there are special and important reasons and that a prime consideration in this matter is whether, in this case the Circuit Court of Arlington County, Virginia and the Supreme Court of Virginia, have decided a Federal question of substance not theretofore

determined by this Court or have decided it in a way probably not in accord with the applicable decisions of this Court. Rule 19, *Rules of the Supreme Court of the United States,* 1970. Your Respondent will show in later argument that this case does not involve a Federal question of substance and that the decisions below were in accord with pertinent decisions of this Court.

Furthermore, as shown in the Petitioners' Appendix and in the attached Petitioners' Notice of Appeal and Assignment of Error, Supplemental Assignment of Error and Index to their Petition for Appeal in the Supreme Court of Virginia (pp. 4b, 7b & 8b), the Petitioners never presented to the Circuit Court of Arlington County, Virginia or the Supreme Court of Virginia, any Federal question of substance. At no time in the foregoing documents did the Petitioners contend that any of the applicable State statutes were unconstitutional. Having failed to raise these issues in the trial Court and highest State Court, the Petitioners should not be given the opportunity to raise them for the first time in this Court.

QUESTIONS PRESENTED

There are no substantial questions involved in the case.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Your Respondent would add the following Virginia State statutes to the Constitutional provisions referred to in the Petition for Writ of Certiorari:

1. §8–13, Code of Virginia, 1950, as amended. (p. 1b)

2. §8-25, Code of Virginia, 1950, as amended, provides:

> If any person against whom a right of action shall have accrued on an award, or any contract, other than a judgment or recognizance, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained under §8-13, if such promise were the original cause of action. An acknowledgment in writing, from which a promise of payment may be implied, shall be deemed to be such promise in the meaning of this section.

3. §8-38, Code of Virginia, 1950, as amended, provides:

> Any action at law or suit in equity, except where it is otherwise especially provided, may be brought in any county or corporation: (1) Wherein any of the defendants may reside.

4. §8-51, Code of Virginia, 1950, as amended, provides:

> A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family, other than a temporary sojourner, or guest, and above the age of sixteen years; or if he or she, or any such person be not found there, by leaving such copy posted at the front door of such place of abode.

5. §8-59.1, Code of Virginia, 1950, as amended, provides:

> Process against, or notice to, a copartner or partnership, may be served upon a partner, and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit, and provided the matter in suit is a partnership matter.

STATEMENT OF THE CASE

Your Respondent agrees with Petitioners' Statement of the Case found on pages 3 and 4 of the Petition for Writ of Certiorari and with the contention that a non-jury trial was held October 13, 1976, before the Honorable William L. Winston, Judge of the Circuit Court of Arlington County, Virginia.

Your Respondent is dissatisfied with the rest of the Statement of the Case in the Petition and contends that the facts of the transaction between the parties are more accurately set out in the letter opinion of the Circuit Court of Arlington County, Virginia of December 23, 1976 found in the Petitioners' Appendix at pages 10a through 14a.

As previously contended by your Respondent in the jurisdictional section, the Petitioners have not raised any Federal questions sought to be reviewed prior to the filing of their Petition, thus the Virginia Courts did not pass upon these questions. Thus, your Respondent contends that the Federal questions were not timely and properly raised and this Court does not have jurisdiction to review this judgment. 23-1(f), *Rules of the Supreme Court of the United States* (1970).

ARGUMENT

For purposes of this argument, Respondent has categorized the issues that Petitioners have attempted to rasie as follows:

1. Was the due process clause of the Fourteenth Amendment of the Constitution of the United States violated?

(a) Was there valid personal service upon the Petitioner Clifford J. Hynning?

(b) If there was valid personal service on the Petitioner Hynning, did this confer upon the Circuit Court of Arlington County, Virginia personal jurisdiction over the Petitioners Hynning and Caravel Office Building Company?

2. Was the full faith and credit clause of the Constitution of the United States violated?

(a) Did the forum err in applying its procedural laws?

(b) Did the forum follow the substantive laws of the District of Columbia in awarding judgment to the Respondent?

1. Was the due process law of the Fourteenth Amendment of the Constitution of the United States violated?

(a) Was there valid personal service upon the Petitioner Clifford J. Hynning?

Throughout these proceedings Petitioner Hynning has admitted to being a long-time resident of Arlington County, Virginia residing at 3700 North Military Road. Title 8-38(1), Code of Virginia, 1950, as amended, provides clearly that the Circuit Court of Arlington County, Virginia was the proper forum in Virginia to proceed against the Petitioner Hynning and nowhere throughout this case did Petitioners contend that there was improper venue or a better

forum within the Commonwealth of Virginia. As pointed out in the Petition, service was effected upon the Petitioner Hynning by posting two copies of the Complaint on the front door of his usual place of abode. Section 8-51, Code of Virginia, 1950, as amended, provides:

> A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family, other than a temporary sojourner, or guest, and above the age of sixteen years; or if he or she, or any such person be not found there, *by leaving such copy posted at the front door of such place of abode.* (Emphasis supplied)

This method of service is widely used throughout the United States and in fact, has been approved in this Court in the case of *Milliken v. Meyer,* 312 U.S. 712, 61 S.Ct. 548, 85 L.Ed. 278, in which the Court held that:

> Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state. Page 462.

See also 62 Am.Jur.2d Process, §69; 126 A.L.R. 1474.

Petitioners referred to Federal Rules of Civil Procedure, Rule 4(d)(3), as not providing for the type of service effect-

ed in our present case. The Petitioners failed to cite to this Court, Rule 4(d)(7) of the Federal Rules of Civil Procedure, which provide as follows:

> Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Obviously, in our present case the service upon Mr. Hynning substantially conformed to the Virginia statute and the Virginia court acquired personal jurisdiction over Mr. Hynning.

(b) If there was valid personal service on the Petitioner Hynning, did this confer upon the Circuit Court of Arlington County, Virginia personal jurisdiction over the Petitioners Hynning and Caravel Office Building Company?

A partnership has been defined in the Uniform Partnership Act as "an association of two or more persons to carry on as co-owners, a business for profit." §50–6, Code of Virginia, 1950, as amended.

Even after the adoption of the Uniform Partnership Act, the jurisdictions are divided as to whether a partnership is a legal entity distinct from the persons comprising it. 60 Am.Jur.2d Partnerships §322, 323. In Virginia it is held that a common law partnership was not a separate entity and thus could not sue or be sued in its firm name. The

Virginia Court has further held that the Uniform Partnership Act does not require the naming of the partnership as a defendant in a suit against the partners. *McCormick v. Romans,* 214 Va. 144, 198 S.E.2d 651 (1973). Indeed, the United States Supreme Court, in the case of *Great Southern Fire Proof Hotel Company v. Jones,* 177 U.S. 499, 20 S.Ct. 690 (1900), held that with regard to jurisdiction of the United States Court based on the diversity of citizenship of the parties, the Court must look to the citizenship of the persons composing a partnership association, even though such association may have some of the characteristics of a corporation.

In an effort to overcome the nebulous character of partnerships, many jurisdictions, including Virginia, have enacted statutes that provide that in actions against members of partnerships, service of process upon one of the partners is service on all and that service of process on one of the partners gives the Court jurisdiction over the partnership. 60 Am.Jur.2d Partnerships, §330.

The Code of Virginia, 1950, as amended, §8–59.1, provides as follows:

> Process against, or notice to, a copartner or partnership may be served upon a partner and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit, and provided the matter in suit is a partnership matter.

Petitioner Hynning has conceded that he was a general partner in the partnership and thus, under the Virginia statute, service upon him sufficed to give Virginia personal jurisdiction over both Petitioner Hynning and the partnership,

the Caravel Office Building Company.

In the Petition, Petitioners have cited a line of cases running from the landmark decisions of *Pennoyer v. Neff*, 25 U.S. 714 (1878) and *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945) through the recent case of *Shaffer v. Heitner*, ___ U.S. ___, 97 S.Ct. 2569 (1977). Respondent would not quarrel with the legal principals enunciated in these cases but would contend that Petitioners' reliance on them is sorely misplaced when considered in light of our present case. The cases relied upon by the Petitioners all involve the forum Court attempting to exercise personal jurisdiction over non-resident defendants by means of constructive service outside of the forum jurisdiction. In our present case we have actual, valid personal service on the general partner of the defendant partnership, the requisite "minimal contact" being the fact that the general partner resided in Virginia and thus, as set out in the *Milliken* case, Virginia:

> . . . which accords him privileges and affords protection to him and his property by virtue of his domicile may also extract reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. (Page 463)

Based on the above, your Respondent would submit that the domicile of the partnership can be the domicile of the general partners and that your Respondent could have proceeded either in Virginia or Maryland, where the other general partner, Carol Smith, resided. A case factually close on point to our case would be the case of *Sugg v. Thornton*, 132 U.S. 524, 10 S.Ct. 163 (1889), which involved a suit in Texas by Mr. Thornton against several defendants,

including a partnership composed of E. C. Sugg, a resident of Texas, and Iker Sugg, a resident of Wyoming. Texas had a statute similar to Virginia, which stated:

> Art. 1224. In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm, and against the partner actually served. (Page 526)

E. C. Sugg was served in Texas and Iker Sugg was served in Wyoming under a Texas statute which allowed constructive service out of state upon a non-resident. The United States Supreme Court upheld the Texas statutes providing for a judgment against the resident partner and the partnership assets only. The *Sugg* case is identical to our present case also in that the non-resident partner appeared and challenged the judgment on the merits and having lost on the merits, the United States Supreme Court held that he could not then contest the proceedings on the grounds that the Court had no jurisdiction over him.

In our present case Caravel Office Building Company filed an Answer and Grounds of Defense (pp. 2b) and had its day in Court and your Respondent would submit that there was no Federal question presented here since the appearance by Caravel Office Building Company precluded it from raising constitutional questions concerning the judgment.

In further support, your Respondent would cite to the Court the case of *Adam v. Saenger*, 30 U.S. 62, 58 S.Ct. 456, 82 L.Ed. 649, wherein the Court held:

> But if the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to

> be presumed unless disproved by extrinsic evidence, or by the record itself." (Page 62)

The Petitioners have cited no authority that would hold that the Circuit Court of Arlington County, Virginia did not have personal jurisdiciton over the Petitioners nor have they rebutted the presumption that the trial Court had jurisdiction over the case and the parties.

2. Was the full faith and credit clause of the Constitution of the United States violated?

(a) Did the forum err in applying its procedural laws?

Petitioners have continually claimed that the procedural law of the District of Columbia should have also been applied by the forum state. Your Respondent contends that the choice of law provision in the note referred to the substantive law between the parties.

Your Respondent submits that the recitation of the note that it is to be governed by the laws of the District of Columbia is a choice of law provision agreed upon by the parties with regard to the substantive law only and that questions concerning the Statute of Limitations are matters of remedy and procedure.

In *Hospelhorn v. Corbin,* 179 Va. 348, 19 S.E.2d 72 (1942), the Virginia Supreme Court embraced the general rule that the Statute of Limitations of the jurisdiction where an action is brought is controlling and not the Statute of Limitations of the jurisdiction in which the contract is made.

In *Norman v. Baldwin,* 152 Va. 800, 148 S.E. 831 (1929) the Virginia Supreme Court held that, with regard to a general Statute of Limitations, the forum law will govern in determining whether an action is time-barred, since general

Statute of Limitations have no extra territorial effect, but relate solely to remedy. In *Willard v. Aetna,* 213 Va. 481, 193 S.E.2d 776 (1973), the Virginia Supreme Court held that:

> In transitory actions, matters of substantive law are governed by the law of the place of the transaction, and matters of remedy and procedure are governed by the law of the place where the action is brought. The court of the forum state determines according to its own conflict of laws rules whether a question of law is substantive or procedural. (Page 483)

Respondent submits that in the present case this is a transitory action involving a general Statute of Limitations and thus, the trial Court correctly construed the procedural law of Virginia to govern this case. 16 Am.Jur.2d Conflict of Laws, §50, §76. An even stronger statement of this principal is the New York case of *Kerr v. Tagliavia,* 168 N.Y.S. 697 (1907), in which the Court held that the law of the forum governs as to remedial matters, irrespective of the intent of the parties. The policy behind these holdings has been aptly set forth in the case of *Bournias v. Atlantic Maritime Co.,* 220 F.2d 152, a Second Circuit Court of Appeals case arising out of New York, in which the Court held:

> While it might be desirable, in order to eliminate "forum shopping," for the forum to apply the entire foreign law, substantive and procedural or at least as much of the procedural law as might significantly affect the choice of the forum – it has been recognized that to do so involves an unreasonable burden on the judicial machinery of the forum and perhaps more significantly, on the local lawyers involved; consequently, for at least

> some questions the law applied is that of the forum, with which the lawyers and judges are more familiar and which can be administered more conveniently. (Page 154)

Clearly, under Virginia procedural law, the trial Court was correct in overruling the Petitioners' plea to the Statute of Limitations. The Petitioners executed three acknowledgement of the debt (pp. 12b, 13b, 14b.) and under §8-25, Code of Virginia, 1950, as amended, the trial Court was correct in finding these to be an acknowledgment of the debt. Respondent further submits that even if the trial Court applied the District of Columbia procedural law with regard to the Statute of Limitations, the law provides that an unequivocable acknowledgment of the debt constitutes an implied promise to pay and takes the contract out of the Statute of Limitations. *T. B. Hoffelfinger v. Gibson,* 290 A.2d 390 (1972). Thus, the Petitioners' acknowledgment of the debt in question is sufficient under either Virginia or District of Columbia law to extend the Statute of Limitations.

(b) Did the forum follow the substantive laws of the District of Columbia in awarding judgment to the Respondent?

Your Respondent submits that the Virginia courts did not violate the full faith and credit clause of the United States Constitution. In the very first paragraph of the trial Court's letter decision of December 23, 1976, the Court found that because of the language of the note in question, the substance of the law of the District of Columbia should apply and in furtherance of this proposition, the Court cited numerous District of Columbia cases and District of Columbia statutory law. The trial Court then turned its attention to the facts of the case and found, as your Respondents contended in the trial Court. that the payment of the $9,000.00 in question to the Respondent was intended by the parties not to be a fee for the loan of money but rather a fee for the sale of Respondent's credit upon which Petitioners could rely in completing their financial plans. The $9,000.00 fee, as the trial Court found, was due immediately upon the execution of the commitment agreement, (pp. 15b), on January 27, 1969, although at that time it was not known if Respondent would actually fund any loan that might be necessary or not. The note securing this loan was dated February 28, 1969, but was not fully funded for several years thereafter. The Court found that the parties intended this commitment fee to be due and payable regardless of whether any loan was ever made and regardless of who made it. In support of this decision your Respondent submits the trial court was correct in relying upon the District of Columbia case of *Oliver v. United Mortgage Company, Inc.,* 230 A.2d 722 (1967) that not every payment in connection with the loan of money is interest. Your Respondent further contends that finding no District of Columbia case factually on point with our present case, the trial Court was correct in applying general law as to whether the payment constituted interest or not. In determining whether the parties intended to commit usury, the substantive law of the District of Columbia provides that the burden of proof was upon the Petitioners to prove that the contract was usurious. *Industrial Bank of Washington v. Page,* 249 F.2d 938 (1957). Finding no District of Columbia case on point as to whether the Respondent's intent or knowledge to commit usury was relevant, the trial Court was correct in looking to the general law of the land which provides that the burden was upon the Petitioners to prove the parties intended usury. 91 C.J.S. Usury ¶114.

Respondent would contend that Petitioners' reliance on *Alaska Packers Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1935) is certainly misplaced since that case involved a state court decision as to the application of conflicting statutes as to the forum Court and the Court where the contract was to be performed. In our present case, there is no conflict between statutes and the trial Court applied the District of Columbia substantive law to the facts in evidence. Respondent contends that the trial Court was correct in applying these facts to the substantive District of Columbia law and where there was none, to the general law of the land; and the Supreme Court of Virginia has found no error in the trial Court's application of the facts in the law. See *Chicago and Alton Railway v. Wiggins Ferry Company, supra.*

Respondent would further submit that therefore there is no substantial Federal question presented upon which this Court should act.

In essence, the Petitioners, while attempting to mount a constitutional attack are in essence attacking the factual judgment of the trial Court. The correctness of this judgment was raised before the Supreme Court of Virginia and by its affirmance of the trial Court, the Supreme Court of Virginia has ruled there has been no manifest error or misconduct. *Pollard v. Bagby, Inc. v. Morton G. Thalhimer, Inc.*, 169 Va. 529, 194 S.E. 534 (1938); *Pryor v. East*, 150 Va. 231, 142 S.E. 729 (1928).

This being the case, Respondent submits that the full faith and credit clause of the Constitution of the United States precludes the Petitioners from arguing, in this Court, the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on

which the judgment is based. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039; *Milliken v. Meyer, supra.*

In our present case since there are no constitutional infirmities, whatever misstatements of law may underlie the trial Court's judgment, that judgment is conclusive as to all the *media concludendi*. *Fauntleroy v. Lum, supra.*

In summary, the Petitioners Hynning and Caravel Office Building Company were served with process in conformity with the applicable state statutes, the constitutionality of which have not been challenged. The method of service in our present case upon both Petitioners as both provided for and actually issued was recognizably calculated to give the Petitioners notice of the proceedings and an opportunity ity to be heard. Thus, the due process notions of fair play and substantial justice are satisfied. *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608.

In our present case not only did the Petitioners receive notice, but they availed themselves of the opportunity to defend this cause and having lost this matter in the trial Court, they availed themselves of the opportunity of appeal to the highest court of the State of Virginia.

CONCLUSION

Your Respondent respectfully submits that there are no substantial questions involved in this case; that the Petitioners have not shown any good or sufficient reason why Certiorari should be granted; that the judgments of the Trial Court and the Supreme Court of Virginia are plainly right and that the Petition for Writ of Certiorari should be denied

Griffin T. Garnett, III
Counsel for Respondent
2000 North 16th Street
Arlington, Virginia 22216

APPENDIX

§8-13. Limitation of personal actions generally.—Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;

If it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and

If it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after;

Provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and

Provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made therefor, by check, order, or otherwise.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & LEGLING, INC.,
A Maryland Corporation
7000 Wisconsin Avenue,
Chevy Chase, Maryland

Complainant,

v.

THE CARAVEL OFFICE BULIDING COMPANY
A District of Columbia partnership,
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036

and

CLIFFORD J. HYNNING,
3700 N. Military Road,
Arlington, Virginia

and

CAROL H. SMITH,
1034 N. Calvert Street,
Baltimore, Maryland

Defendants.

In Chancery No. 26191

ANSWER OF DEFENDANT

Comes now Clifford J. Hynning, appearing pro se, individually, and as managing general partner of Caravel Office

Building Company (hereinafter called "Caravel") to make this answer. Insofar as this answer is on behalf of Caravel, it is made by virtue of a special appearance made by Clifford J. Hynning, as managing general partner thereof, and in no way prejudices the right of Caravel to raise questions as to the validity of the service of process in a motion filed herewith to quash such service insofar as Caravel is concerned.

Defendants admit, deny and allege as follows:

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action.

THIRD DEFENSE

Defendants admit that the allegations contained in complaint paragraphs 1 and 2; admit that defendant Clifford J. Hynning is a general partner in Caravel and is a resident of Arlington County as alleged in complaint paragraph 3, but further state that all Hynning's office and other business activities as general partner of said partnership are conducted in the District of Columbia and are not carried on in any office or through any other activities in Virginia; deny each and every other allegation contained in the complaint.

WHEREFORE, defendants, having fully answered, demand that judgment be entered in their favor dismissing plaintiff's complaint with prejudice.

Respectfully submitted,

/s/ Clifford J. Hynning
CLIFFORD J. HYNNING,
pro se, and as Managing General
Partner of CARAVEL OFFICE
BUILDING COMPANY, 1555
Connecticut Avenue, N.W.
Washington, D.C. 20036
Suite 301,
Telephone N. 232-0775

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & LEBLING, INC., A Maryland Corporation, Complaintant	
v.	IN CHANCERY NO. 26191
THE CARAVEL OFFICE BUILDING COMPANY, A District of Columbia Partnership	AT LAW NO. 18633
and	
CLIFFORD J. HYNNING	
and	
CAROL H. SMITH, Defendants	

NOTICE OF APPEAL
AND ASSIGNMENT OF ERROR

To: David Bell
Clerk of the Court
Circuit Court of Arlington County
Arlington, Virginia 22201

NOTICE IS HEREBY GIVEN that the defendants, THE CARAVEL OFFICE BUILDING COMPANY, and CLIFFORD J. HYNNING appeal from a Final Judgment entered by this Court of the 14th day of January, 1977, and announce their intention of applying for a Writ of Error to the Supreme Court of Virginia.

ASSIGNMENT OF ERROR

The Trial Court erred:

1. In granting judgment to the Plaintiff.
2. In ruling that the loan transaction which was the subject of this case was not usurious.
3. In ruling that the $9,000.00 front end fee paid by the borrower (defendants) to the lender (plaintiff) does not constitute "interest".
4. In ruling that the loan transaction was not usurious after acknowledging that, in addition to the maximum legal rate of interest, the lender required the borrower to pay a fee prior to the lender funding the loan.
5. In ruling that the $9,000.00 front end fee was a loan commitment.
6. In ruling that a loan commitment fee does not constitute interest under circumstances where the fee goes to the same person who receives the interest.
7. In ruling that the intent of the parties is determinative of whether a front end fee constitutes interest or whether a loan transaction is usurious.
8. In ruling that an otherwise usurious loan transac-

tion was made legal because of the intent – or the absence of bad intent – by the parties or the lender.

9. In ruling that a front end fee that was paid to the lender in connection with making the loan does not constitute interest because the loan was part of a total financing package.

10. In ruling that a front end fee paid to the eventual lender in connection with a loan is not interest as long as the recipient of the fee was not obligated to actually fund the loan at the time the fee was paid.

11. In ruling that the party alleging usury must prove a corrupt intent to conceal it under an ostensibly lawful contract or transaction.

12. In ruling that the evidence was insufficient to establish that the loan transaction was usurious.

THE CARAVEL OFFICE BUILDING COMPANY and CLIFFORD J. HYNNING

By: /s/ Peter K. Stackhouse

Peter K. Stackhouse, Counsel for defendants, The Caravel Office Building Company and Clifford J. Hynning

TOLBERT, SMITH,
FITZGERALD & RAMSEY
2300 South Ninth Street
Arlington, Virginia 22204

By: /s/ Peter K. Stackhouse

Peter K. Stackhouse

[Certificate of service omitted in printing]

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & LEBLING, INC., a Maryland Corporation, Complainant,	)	
v.	)	IN CHANCERY #26191 AT LAW No. 18633
THE CARAVEL OFFICE BUILDING COMPANY, a District of Columbia Partnership and CLIFFORD J. HYNNING and CAROL H. SMITH, Defendants.	)	

SUPPLEMENTAL ASSIGNMENT OF ERROR

13. The Trial Court erred in refusing to dismiss this action based upon the defendants' motion that the Circuit Court of Arlington County was a forum non-conveniens.

14. That the Trial Court erred in failing to rule that the plaintiff was barred from using the Virginia Courts as a forum for this action, because of the choice of law provision agreed to by the parties in the promissory note.

15. The Trial Court erred in refusing to apply the procedural law of the District of Columbia.

16. The Trial Court erred in refusing to apply the applicable District of Columbia statute of limitations which would have resulted in a dismissal of this action.

THE CARAVEL OFFICE BUILDING COMPANY and CLIFFORD J. HYNNING

By: /s/ Peter J. Stackhouse
Counsel

TOLBERT, SMITH, FITZGERALD
& RAMSEY
2300 South Ninth Street
Arlington, Virginia 22204

By: /s/ Peter K. Stackhouse
Peter K. Stackhouse

[Certificate of service omitted in printing]

INDEX TO PETITION

12b

COUNCILOR, BUCHANAN & MITCHELL
CERTIFIED PUBLIC ACCOUNTANTS
3900 WISCONSIN AVENUE
WASHINGTON, D.C. 20016

Caravel Office Building Co.
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036

June 22, 1973

In auditing the books of Bagley, Hartung, Mahoney & Lebling, Inc.

we find the status of your account(s) as of May 31, 1973, to be as follows:

Owing by you on open account	$
Owing by you on notes	$
Owing to you on open account	$
Owing to you on notes	$
Owing by you on construction loan #TF-25	$ 79,076.42
Accrued interest at 8%	$ 5,271.80

Will you please advise on the form below whether this statement is correct, using the enclosed stamped envelope for your reply. Do not send remittance with this confirmation.

APPROVED: COUNCILOR, BUCHANAN & MITCHELL

We certify that the statement of our account(s) as shown above is correct, with the following exceptions:

Caravel Office Bldg Co.

17 Aug, 1973 By Clifford Hynning
Mgl. Gen. Partner
Plaintiffs Ex # 4

13b

COUNCILOR, BUCHANAN & MITCHELL
CERTIFIED PUBLIC ACCOUNTANTS
3900 WISCONSIN AVENUE
WASHINGTON, D.C. 20016

DISTRICT COURT
SEP 6 1974
RECEIVED

Mr. Clifford J. Hynning
Caravel Office Building Co.
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036

SECOND REQUEST

August 20, 1974

In auditing the books of Bagley, Martin, Mahoney & Lebling, Inc.

we find the status of your account(s) as of May 31, 1974, to be as follows:

Owing by you on open account	$
Owing by you on notes	$
Owing to you on open account	$
Owing to you on notes	$
Accrued interest at 8%	$ 11,597.92
	$

Will you please advise on the form below whether this statement is correct, using the enclosed stamped envelope for your reply. Do not send remittance with this confirmation.

APPROVED: COUNCILOR, BUCHANAN & MITCHELL

We certify that the statement of our account(s) as shown above is correct, with the following exceptions:

So far as I can tell from my records as of Dec 31, 1973, the above is substantially correct

Caravel Office Bldg Co

5 Sept, 1974 By Clifford Hynning
Mgn Gen. Partner
Plaintiffs Ex. # 4

COUNCILOR, BUCHANAN & MITCHELL
CERTIFIED PUBLIC ACCOUNTANTS
3900 WISCONSIN AVENUE
WASHINGTON, D.C. 20016

Caravel Office Bldg. Co.
Suite 301
1625 Connecticut Ave., N.W.
Washington, D.C. 20036

July 17, 1975

In auditing the books of Bogley, Harting, Mahoney & Lebling, Inc.

we find the status of your account(s) as of May 31, 1975, to be as follows:

Owing by you on open account	$
Owing by you on notes 2nd trust	$ 79076.49
Owing to you on open account	$
Owing to you on notes	$
Accrued interest	$ 1792.42
	$

Will you please advise on the form below whether this statement is correct, using the enclosed stamped envelope for your reply. Do not send remittance with this confirmation.

APPROVED: COUNCILOR, BUCHANAN & MITCHELL

We certify that the statement of our account(s) as shown above is correct, with the following exceptions:

Caravel Office Bldg Co
By Clifford Hynning
Mail Partner

, 19 By

Plaintiffs Ex. #6

BOGLEY, HARTING, MAHONEY & LEBLING, INC.
7000 Wisconsin Avenue
Chevy Chase, Maryland 20015

COMMITMENT

To: Caravel Office Building Company, Limited Partnership
Clifford J. Hynning, General Partner

Dear Mr. Hynning:

We are pleased to issue you a standby commitment in the amount of ~~$62,000.00~~ *($100,000)* subject to the following terms and conditions:

100,000
AMOUNT: ~~$62,000~~ to be funded between the date hereof and December 31, 1970, providing said funds are required and used for the purpose pf paying for tenant finishing in the office building to be constructed known as the Caravel Office Building, located at 1601 Connecticut Avenue, N.W., Washington, D.C. in Lots 60, 61 and 62, Square 111.

TERMS AND SECURITY: If said funds are called *$100,000* upon for disbursement, the interest rate on the ~~$62,000~~ will be at the best available rate to Bogley, Harting, Mahoney & Lebling, Inc. for this loan through Bogley's banking facilities plus an additional 2% annual interest rate (Example – bank collateral loan rate plus 8% plus 2% to Bogley – total annual rate of 10% on outstanding funds).

Bogley will charge for the standby commitment a fee of *9%* *$100,000* *9,000* ~~7%~~ of ~~$62,000~~ equivalent to ~~$4,340~~ which will be paid at the time of closing under the sale-leaseback commit-

ment with Sun Life Assurance Company of Canada on the subject property; said fee shall be declared as earned due and payable at the time of signing this commitment.

As securty for the subject loan, should funding be requested, Caravel Office Building Company and Clifford J. Hynning as general partner are to sign and Clifford J. Hynning to also sign personally a second deed of trust and note which will be secured by the above-captioned property and a term of said note and deed of trust will be for one year from the date of recording. As additional collateral, the deed of trust and note will also be secured as a second trust on improvements known as 1555 Connecticut Avenue, N.W., Square 112, Lot 800. It is understood that title to this property is in the name of Clifford J. Hynning as trustee under the Anchorage-Hynning Partnership. It is further understood that should said funding be required, the condition precedent pertaining to the recording of the second trust on the above-referred to properties that said second trust will be in an amount which will include $62,000 plus any amounts remaining unpaid on the original $47,500.00 second trust now secured by the property referred to above known as 1601 Connecticut Avenue, N.W. It is understood and a condition of this commitment that at the time of closing and funding of the Sun Life purchase and leaseback of the ground known as Lots 60, 61 and 62, Square 111 the outstanding princpal sum of Bogley $47,500 original loan with the present balance of money drawn as $40,900 will be curtailed by $20,000 leaving an outstanding balance of $20,900; and which will remain at the present time as a second trust against the leasehold estate known as Lots 60, 61 and 62, Square 111.

Clifford J. Hynning as general partner of Anchorage-Hynning Partnership and general partner of the Caravel

Office Building Company covenants and agrees that he will not encumber by virtue of the second trust financing any of the above two identified properties - 1601 Connecticut Avenue, N.W. and 1555 Connecticut Avenue, N.W. unless the total Bogley financing as indicated above has been completely paid in full. * (See Below)

A further condition of this commitment is that any money advanced by Sun Life Assurance Company or any other banking institution for tenant finishing will be used to pay off in full the Bogley $62,000 trust; and furthermore, that if sufficient monies are not available through those sources, then Bogley will have first claim on the sum of approximately $138,000 representing the difference between the floor amount and the top amount of Sun Life Assurance Company's leasehold permanent commitment, identified under Commitment #DC 713-632 dated August 7, 1968. It is specifically understood that this money is to be used for the payment in full of the total Bogley obligations if said funds are available during the one year term of the Bogley second trust.

If in the event there would not be sufficient funds available to pay the Bogley loan in full by virtue of the holdback amount of $138,000 under the Sun Life commitment and the term of the second trust has not expired, all net rental income from the office building to built at 1601 Connecticut Avenue, N.W. will be assigned to Bogley for the purpose of paying interest first and the balance to principal curtailment. It is further understood that by virtue of Bogley's issuance and Hynning's, as general partner, acceptance of this commitment he is relinquishing his prior right to draw down the undisbursed portion of the $47,500 loan with a principal balance outstanding of $40,900. It is further understood that all fees, interest payments and the Bogley $25,000 second trust, as well

as all financing arranged by or through the Bogley Mortgage-Banking Company will be paid in its entirety at the time of the closing of the Sun Life purchase and lease-back commitment.

This commitment is subject to our counsel's approval of the title to the above-referred properties as being marketable and that Bogley would, in fact, have no legal impediments to its second trust other than Sun Life Assurance Company's permanent loan on the leasehold estate for the building to be constructed at 1601 Connecticut Avenue, N.W. and the first trust original loan of $360,000 made by the Equitable Life Assurance Society of the United States, secured by property located at 1555 Connecticut Avenue, N.W.

It is understood that this commitment is to be satisfactory and acceptable to National Savings and Trust Company, the construction lender, as same is being obtained to satisfy their requirements under the conditions of the of the construction loan commitment.

We trust that the above commitment satisfies your requirements and we will appreciate your accepting said commitment as indicated below.

Very truly yours,

BOGLEY, HARTING, MAHONEY
& LEBLING, INC.

/s/ Carville J. Cross
Carville J. Cross

CJC/lb

I hereby accept the above commitment and all of its terms and conditions.

1-22-69 — Date
/s/ Clifford J. Hynning — Clifford J. Hynning, personally

ANCHORAGE-H

ANCHORAGE-HYNNING PARTNERSHIP

1-22-69 — Date
/s/ Clifford J. Hynning — Clifford J. Hynning, Trustee and General Partner

CARAVEL OFFICE BUILDING COMPANY

1-22-69 — Date
/s/ Clifford J. Hynning — Clifford J. Hynning, General Partner